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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Cellular Service and Other)
Commercial Mobile Radio Services)
in the Gulf of Mexico)

WT Docket No. 97-112

Amendment of Part 22 of the)
Commission's Rules to Provide)
for Filing and Processing of)
Applications for Unserved)
Areas in the Cellular Service)
and to Modify Other Cellular Rules)

CC Docket No. 90-6

To: The Commission

REPLY COMMENTS OF DW COMMUNICATIONS, INC.

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Dated: April 10, 2000

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Summary of the Filing

The record is stale with respect to proposed PCS and SMR service areas in the Gulf of Mexico. The 700 MHz band provides ample spectrum relief without disrupting already authorized services.

Additional licenses in the Gulf would not meet the Commission's stated objectives. Conflicts would not be reduced and new problems would be added.

Some problems, even if resulting from regulation, have no solution in regulation. Rather, their solution is to be found in the marketplace.

Even if the solution proposed for the Cellular Service would be useful, that solution would not be applicable to the PCS and SMR Services. The proposed solution for the Cellular Service has nothing to offer the PCS and SMR Services.

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REPLY COMMENTS OF DW COMMUNICATIONS, INC.

DW Communications, Inc. (DW), by its attorney, hereby files its Reply Comments in the above captioned matter. In support of its position, DW shows the following.

As DW explained in its Comments, DW is the licensee of two blocks of spectrum in the 900 MHz band in the New Orleans-Baton Rouge MTA. DW does not operate a Cellular system and, accordingly, does not reply specifically to many of the comments which were limited to strictly Cellular matters.¹

¹ Although DW has considered all of the comments which were filed, DW will not list herein all of the commentors who presented essentially duplicative positions on an issue.

The 700 MHz Band Obsoletes A Portion Of This Proceeding

The record in WT Docket No. 97-112 is stale with respect to the Commission's proposal to adopt Gulf of Mexico geographic licensing and operational rules for the Personal Communications Service and for the Specialized Mobile Radio Service, because the proceeding has been overtaken by events. Accordingly, the proceeding in WT Docket No. 97-112 with respect to PCS and SMR should be terminated without action.

At the direction of Congress, the Commission has scheduled prompt auctions for ample land mobile spectrum in the bands 745-764 MHz and 776-794 MHz (the 700 MHz Band). The 700 MHz Band provides such a large quantity of Commercial Mobile Radio Service spectrum that it is no longer necessary for the Commission to consider disrupting the reasonable expectations of the participants in the PCS and SMR spectrum auctions. It is also not necessary for the Commission to consider further in the PCS and SMR bands what it has recognized as "the difficult interference issues that have arisen in the past when one licensee served the Gulf and different licensee the adjoining land," Second Further Notice of Proposed Rule Making in Service Rules for the 746-764 and 776-794 MHz Bands, WT Docket No. 99-168, _____ FCC Rcd. _____ n. 137 (FCC 00-5 Released January 6, 2000). Because interference to Television Broadcast signals on channels 60-69 from stations in the Gulf of Mexico should be nil, the 700 MHz band can be placed into service there immediately. Rather than disrupting existing services, the Commission should rely on the 700 MHz band for any frequency relief required in the Gulf of Mexico.

Although DW has no direct interest in the territorial problems of the Cellular carriers which collide at the Gulf of Mexico coastline, DW does offer the following, in the hopes that it will be helpful in several aspects of this proceeding: For some conflicts, there may be no solution possible without a sea change of belief and attitude. The news reports of border conflicts across the world, fresh each day, may obscure the fact that some border controversies have gone on for hundreds of years. Efforts to resolve them from the outside routinely fail, while the conflicts continue to grind down all of the participants as surely as the Gulf of Mexico continuously scours the shores. A frank analysis must show that in some conflicts, no external power can apply a strong enough patch across a contentious boundary.

The Commission's Stated Goals Would Not Be Met

At paragraph two of its Second Further Notice of Proposed Rule Making in the above captioned matter (SFN), the Commission stated its principal goals in this proceeding:

- (1) To establish a comprehensive regulatory scheme that will reduce conflict between water-based and land-based carriers,
- (2) to provide regulatory flexibility to Gulf carriers because of the transitory nature of water-based sites; and
- (3) to award licenses to serve well-traveled coastal areas to those carriers that value the spectrum most highly and will maximize its use to provide the best quality of service to the public,

SFN at para. 2. Were it to award additional licenses, the Commission would fail to reach any of its stated objectives.

The Commission's proposal for a Coastal Zone patch cannot be expected to resolve the conflict between existing water-based and land-based carriers without adding more problems to the mix. DW concurs with Southwestern Bell Mobile Systems, Inc. (SBMS) and with Palmer Wireless, Inc. that more interference controversies cannot but arise from the Commission's proposal for a Coastal Zone. The Fifteen-Years' War between the GMSA operators and the coastal MSA licensees before the Commission has impaired all that have been involved, including the Commission. The Commission's records will show the difficulties which the Commission has already encountered. At one point in the controversies between Petroleum Communications, Inc. (PetroCom) and GTE Service Corporation (GTE), nearly six years elapsed between the time that the last pleadings were filed in a certain proceeding and the release of the Commission's decision. PetroCom and GTE are again at sixes and sevens with one another in this proceeding (or more correctly, including the position of BellSouth, the carriers are at 12s and 25s). The border skirmishes among the coastal carriers have consumed an appalling amount of the Commission's resources, as well as those of all of the carriers, and may have been partly to account for the financial distress of one of the Cellular carriers in the Gulf.

DW cannot suggest that it has the solution to the Cellular problem, but it is certain that some commentators do not. GTE, joined by others, asks for the Commission to take away the Gulf carriers' service areas to a line 25 miles from shore. BellSouth Corporation (BellSouth), perhaps more humbly, would be satisfied with only 12. Their arguments would be equally valid if proffered by the Gulf carriers in support of a request that the Commission "merely

extend . . . boundaries twelve miles,” BellSouth at 4, landward, into the coastal MSA operators’ territory. Perhaps the Commission could have done better 15 years ago,² but the current arrangement has been in place for quite a long time now, and the Gulf carriers and the landward carriers are all providing service to the public and some are providing good service to the public and appear to be making money. Could Cellular service to the public be improved? Certainly, but the proposed Coastal Zone won’t solve the problem, and neither will some commentators’ proposals to take away even more of the other fellow's territory and give it to them. Unless the Commission wants to become even more deeply mired in hearings and appeals, it should recognize coastal quicksand for what it is and leave it to each of the carriers to change their attitudes and all give a little in their struggles against one another so that they can all give better service to the public.

It may be helpful to recall why the Three Marine League line was drawn as the seaward boundary of some of the States. The reason was that three leagues was as far as a shore battery in those days could fire a shell to sink a vessel. The Commission should not come within three marine leagues of creating new coastal problems in other radio services. Existing operators building out their systems don’t need new problems, the public doesn’t need them, and, most of all, the Commission doesn’t need any more incoming fire.

² Given the defined sequence of tasks which all Cellular mobile units must perform in search of a control channel, it is entirely possible that the Commission could not have done better.

In the Cellular Service, all of the systems were authorized across the nation essentially concurrently, without the benefit of experience in the coastal situation. In all of the other CMRS services, that is, PCS, SMR, and Paging and Radiotelephone, there is already substantial licensing and operation along the coast. Given its experience, the Commission could hardly be seen as wise were it to create more administrative wetlands (or, less graciously, swamps) along the coast.

The Cellular carriers on both sides of the coastline have it within their wallets to solve the problem with one another without consuming any more of the Commission's scarce resources. The Commission should leave them to solve the problem themselves, for they surely have the resources to do so. DW respectfully suggests that the Cellular problem will be most expeditiously solved by the Commission's making clear that it has considered the problem thoroughly in this proceeding, but has nothing more to offer the existing carriers, and that their good faith progress toward a solution in the public interest will be taken into account at license renewal time.

The Commission could not possibly authorize additional SMR and PCS carriers in the Gulf without creating new conflicts. In the Cellular field, the Commission has controversies involving only two offshore carriers with their MSA counterparts. Issuance of Gulf licenses for the 900 MHz band frequency blocks, the 800 MHz frequency blocks, and the PCS spectrum blocks would create dozens of new occasions for conflict. Accordingly, licensing of

any additional SMR or PCS carriers would clearly be contradictory to the first of the Commission's stated goals.

The Commission would not provide any additional regulatory flexibility to Gulf carriers by creating the Coastal Zone. The existing carriers already have all the regulatory authority that they need to enter into agreements with one another that would solve the problem. They need nothing more, nor is there any reason to believe that any of the Commission's proposals would provide any additional regulatory flexibility to the Gulf carriers.

Although the Commission's third objective points toward an auction between or among mutually exclusive applications, the Commission would not have the authority to hold an auction for any of the proposed licenses. Section 309(j) of the Communications Act of 1934, as amended, provides authority to conduct competitive bidding only for an "initial license," 47 U.S.C. §309(j). The offshore Gulf carriers already hold licenses for Cellular service to the proposed Coastal Zone. It would be clearly contrary to the intent of Congress for the Commission to involuntarily modify the licenses of the existing Gulf operators for the purpose of selling back to them or their competitor what the Commission took away. The existing MTA licensees in the PCS and in the SMRS already hold licenses to serve the Gulf. Therefore additional licenses to serve the Gulf would not be initial licenses for use of the PCS or SMR spectrum. The Commission would not act lawfully to take away rights which the PCS and SMR operators had paid for with the intention of selling the rights back to the

existing licensees or to anyone else, unless the Commission were in a position to pay just compensation to the existing, initial licensees.

New Problems Need Never Arise

DW began its participation in this proceeding by suggesting a means of defining a dividing line between MTA licensees at 900 MHz and Gulf operators. The comments which have been filed have helped DW to recognize that it was trying too hard to solve a problem which need never arise.

DW supports PetroCom's comments insofar as they suggest that the Commission refrain from licensing additional wide areas services in the Gulf of Mexico. The study which PetroCom presented, "Competition in Wireless Telecom Services in the Gulf of Mexico", by Larry F. Darby (the Darby Report), makes a strong case that the Commission should "insist, as a condition of going forward, that proponents document that markets are not now working in the GMSA; and that clear and substantial advantages are not only possible, but likely, from adding new licenses," Darby Report at 20. While several commentators indicated a desire to provide service or to have additional service available, none showed that markets are not now working in the Gulf or that clear and substantial advantages to the public are likely to flow from adding new licenses. No proponent of additional licenses presented any economic support for their positions.

Fortunes were made by most of the initial Cellular operators. Yet, one of the two Cellular carriers in the Gulf was unable to keep its head above the financial waters, and the Darby Report suggests that that Cellular carrier may not have reached profitability after some fifteen years of authorization. In view of the strength of the Darby report, it would not be sufficient for the Commission to authorize an additional service merely on the basis that someone might like it. A common sense conclusion would be that the Commission would have to have strong economic support to authorize additional service in the Gulf in the near term, and no such support was provided by any commentator.

Shell Offshore Services Company (Shell) provided no factual support for its conclusion that telecommunications service providers have been unable to keep up with a growing demand because spectrum used to provide these services elsewhere is not available for licensing in the Gulf. Assuming that Shell is correct that providers have been unable to keep up with demand, there may be many reasons for that situation other than insufficient spectrum. Recognizing the thinness of the Gulf market and the historical volatility of the demand, providers may reasonably have been reluctant to float new investments into the area. Similarly, the American Petroleum Institute (API) presented its belief that there was demand for SMR services in the Gulf, but API did not quantify that demand or suggest any reason why the demand in which it believed could not be met by the existing services and by the already authorized, but not yet constructed, services.

Shell suggested that no demonstration of demand should be required in the Gulf, on the basis that no demand was required for the Commission to license SMR systems in American Samoa and Guam. The Gulf of Mexico washes upon a coast along which numerous systems are already licensed for service in all of the SMR frequency bands. The insular areas on which Shell would rely as its precedents are great distances from any point of the United States which could be called mainland and there is no potential for co-channel interference between systems on those islands and any other United States station.³ The absence of risk of interference in the island territories may have reasonably led to the conclusion that the Commission was, at the least, safe in awarding licenses in those places. Because the Cellular situation has demonstrated the potential for serious interference along the Gulf coast and for entangling, intractable problems for the Commission, the Commission would be unjustified in authorizing new, potentially interfering operations without an exceedingly great need to protect the safety of life and property and no commentator suggested that there was any such need. Assuming, however, that the demand suggested by Shell does exist, the 700 MHz Band should provide all necessary relief.

³ Guam's closest neighbor is the Commonwealth of the Northern Mariana Islands, which consists of a group of 14 islands (7 of which are uninhabited) having a total land area of 179 square miles, spread over an archipelago 300 miles long. Guam is hundreds of miles from any place other than the Northern Marianas. American Samoa lies 2300 miles from Honolulu. The Independent State of Samoa has an average annual gross domestic product of \$2,100, and would not appear to be a likely candidate for an interfering Cellular system in the foreseeable future, *passim*, World Almanac and Book of Facts 2000 (1999).

BellSouth may be partly correct in its assertion that “if GMSA licensees retain the right to serve coastal areas of the Gulf, service will depend largely on the location of oil rigs,” BellSouth at 8. The converse in the Cellular service, however, does not hold. The converse in the Cellular service is that if the landward carriers are given the right by the Commission to serve coastal areas, service will depend largely on the courts.

Cellular service along the coast presents a bad situation, but all carriers accepted their free licenses recognizing and accepting the problems and accepting the obligation to provide service to the public. The same cannot be said of the other CMRS services. In PCS and the 900 MHz SMR services, applications were accepted, auctions were held, bids were accepted and licenses granted for the coastal MTAs and BTAs, with the understanding that there would be no potential for interference from the Gulf and, as BellSouth recognized at its pages 4-5, those licensees are entitled to serve both land and Gulf areas. Under their existing licenses, the SMR and PCS licensees can provide satisfactory service to the coastal area of the Gulf without being restrained by interference.

At page 7 of its comments, GTE requests that if the Commission authorizes PCS and SMR geographic areas in the Gulf, that those services not be provided with any competitive advantage over the Cellular service. Apparently misery prefers company. While the Commission could choose to impose as much interference potential on the end users of PCS and SMR service as Cellular customers may experience, the Commission has the opportunity to do better for the public, given 15 years of experience with coastal operations. As GTE

recognizes, “some PCS provider networks already extend into the Gulf,” *id.* In its own MTA, DW is moving rapidly to construct transmitters that will provide service to the Gulf. Assuming that GTE is correct in suggesting that “land-based transmitters can be configured to reliably cover a territory up to fifty miles from the shoreline,” GTE at 10, and given that the Commission has already decided that PCS is to be provided to the Gulf by the MTA carriers, there is no reason to believe that PCS and 900 MHz SMR MTA operators cannot provide a high grade and quality of service to the coastal areas. In view of the rights confirmed in Mobil Oil Telecom, Ltd., 11 FCC Rcd 4115 (WTB 1996) (“Mobil Oil”), there is reason to expect that MTA operators will serve the offshore areas well.

The Proposed Cellular Solution is Inapplicable to SMR and PCS

There are distinct differences between the MSA Cellular service and the 900 MHz band MTA service. These differences make the Commission’s approach to solving the Cellular problem inapplicable to the 900 MHz band SMR service and to the PCS service. Those differences also argue in favor of not authorizing additional Gulf carriers.

As the Commission knows, MSAs do not include water areas. However, as some commentors observed, *e.g.*, Sprint Spectrum L.P. d/b/a Sprint PCS, MTAs are based on county boundaries which, in the cases of Louisiana, Texas, and Florida, extend miles beyond the coastline. A substantial difference between MSAs and RSAs occurs in the case of the Chandeleur Islands. The MSA does not include the Chandeleur Islands or the waters of Chandeleur Sound. The MTA, however, does include those areas.

Cellular licensees paid the Commission only nominal filing fees to obtain consideration of their applications. Operators of wide-area 900 MHz band SMR systems and PCS licensees paid the Commission, not for consideration of their applications, but specifically for their MTA licenses which, under the Commission's Rules, include a package of operating rights.

Those persons who bid for 900 MHz band SMR licenses did so with knowledge of Rule Section 90.671 of the Commission's Rules which limits field strength at the MTA boundary, "unless all bordering MTA licensees agree to a higher field strength," 47 C.F.R. §90.671. Since there clearly was no MTA seaward of the coastal MTAs, and since it was highly unlikely that any part of the Gulf seaward of the existing MTAs would ever be denominated a Major Trading Area® by Rand-McNally, the coastal MTA applicants reasonably set their bids based on their neither having to protect any seaward licensee from interference nor ever having to suffer interference from any operator in the Gulf. The MTA bidders had seen the Cellular problem which had troubled the Commission along the coast and had good reason to expect that such a problem would never be visited upon them. The Commission now would take some of the rights of the coastal licensees without providing them with any form of compensation, whatsoever, see, U.S. CONST., AMEND. V. Having sold a certain package of rights for good and valuable consideration, the Commission is not now well positioned to unilaterally reduce those rights.

The Commission affirmed the expectations of the 900 MHz band MTA licensees when it provided in Mobil Oil that there is no PCS licensee for water areas of the Gulf of Mexico,

and that entities eligible to serve the Gulf of Mexico are the licensees bordering the Gulf. Because the FCC also provided for no wide-area 900 MHz band SMR system in the Gulf at the time that it accepted bids for MTA licenses, the action in Mobil Oil is directly applicable to the 900 MHz band SMR service, leaving no room for additional licensees in the Gulf.⁴

In PCS and SMR, the Commission Has Nothing to Offer a New Licensee

Nextel Communications, Inc. (Nextel) explained that its experience shows that it suffers interference from offshore stations to its system north of New Orleans, indicating that 70 miles of co-channel separation is insufficient to prevent interference between stations on each side of the coastline. While DW does not believe that the public interest would be well served by authorizing additional 900 MHz band SMR operators in the Gulf of Mexico, if the Commission were to authorize additional operators, it should do so only after a full technical study of the peculiar nature of coastal propagation and a full economics study of service to offshore end users. While calculations can be done, such as those done by SBMS, based on existing models, the remarks of SBMS's engineers raise doubts as to the reliability of calculated results, even by methods that are generally accepted as the most appropriate for land operations in the 900 MHz band. Nextel did not suggest the separation distance which it believed might be serviceable.⁵ DW concurs with Nextel's conclusion that "it is likely that

⁴ It should also be noted that the action in Mobil Oil was released before the close of the auction for 900 MHz band SMR MTA licenses, and, accordingly, bidders were able to take the action into account in making their final bids.

⁵ In its Petition for Rule Making, PetroCom suggested that the separation distance would need to be at least 176.5 miles. If PetroCom is correct, a Gulf station in the 900 MHz

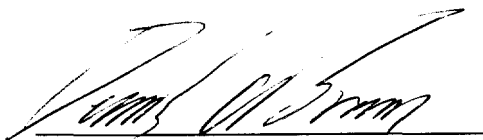
channel re-use of existing licensed stations in much of the Exclusive Zone could be effectively precluded," Nextel at 5. DW believes that experimental tests by the Commission would likely show that offshore operations would have to be restricted to sites which were so far from shore that there would be no economic Gulf operation possible.

SMR band would have to be so far out from coastline station of an MTA operator that the station would have only 25 miles of coverage available before it ran into the 200 mile limit of United States sovereignty, leaving it an infinitesimally small end user market. DW does not know whether PetroCom is correct, but PetroCom is an existing 800 MHz band SMR operator in the Gulf and has every interest in making a correct prediction.

Conclusion

DW said earlier that it recognized that, in its initial comments, it had been trying too hard to solve a problem which need not exist. DW's review of the comments which were filed shows that the Commission's efforts to solve the Cellular problem would not meet any of the stated objectives. Authorizing additional SMR and PCS operators in the Gulf would create — not remove — conflicts. In the absence of substantial, credible evidence of need for new service, the Commission would be well advised to close its ears against the siren song of auctions and to steer far from the Gulf Coast shore.

Respectfully submitted,
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Dated: April 10, 2000

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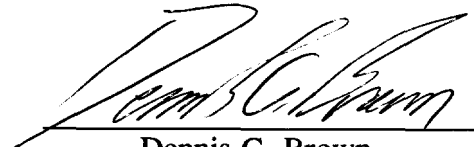
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